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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSIONIN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S
RESPONSE TO COMPLAINANT'S
MOTION FOR SUMMARY
JUDGMENT**

Rigby Water Company ("Rigby") hereby responds to Complainant's Motion for Summary Judgment dated May 5, 2009. As detailed in both Rigby's Answer and previously filed Motion to Dismiss, there is simply no basis for a grant of summary judgment on the record before the Commission.

I. FACTUAL BACKGROUND

The Complainant, Mr. Dains, was the developer of the Terra Ranchettes Estates ("Terra Ranchettes") located in Avondale, Arizona. [See Statement of Facts (6/9/2009) ("SOF"), ¶ 1.] As part of that development, Mr. Dains installed the infrastructure necessary to provide water service to Terra Ranchettes in or about March 1996. [Id., ¶ 2.] Mr. Dains completed construction of Terra Ranchettes in or about June 1997. [Id., ¶ 3.]

After construction was complete, Mr. Dains requested that Rigby assume operation of the Terra Ranchettes water system. [Id., ¶ 4.] In March 1999, nearly two years following completion of construction, Mr. Dains and Rigby entered into and signed a form of Rigby's

1 standard main line extension agreement (the "Agreement"). [SOF, ¶ 5.] Under the terms of
2 the Agreement, Mr. Dains was to receive ten percent of the amounts received by Rigby for
3 the provision of service to Terra Ranchettes for a period of twenty years. [Id.] The
4 Agreement also provided, consistent with Commission rules, that any amounts not refunded
5 during that time would become an unrecoverable contribution in aid of construction. [Id.,
6 ¶ 6.] Mr. Dains, who had actually designed and constructed the system was also obligated
7 to provide the Certificate of Approval to Construct ("ATC") required by Commission rules.
8 [Id.] Mr. Dains never provided the required ATC. [Id., ¶¶ 7, 8.]

9 In October 2006, after the City of Avondale discussed acquiring Rigby, Mr. Dains
10 lodged an informal complaint with the Commission raising the same issues raised in this
11 proceeding. [Id., ¶ 10.] That informal complaint included a copy of the Agreement. [See
12 Informal Complaint materials docketed by Staff in this proceeding (6/2/2009).] Rigby
13 responded to that complaint by providing an accounting relating to payments made to
14 Mr. Dains, along with a copy of the Agreement, to the Commission. [See Id., ¶ 11.] The
15 Commission took no action on Mr. Dains' informal complaint. [[See Informal Complaint
16 materials docketed by Staff in this proceeding (6/2/2009).]

17 In a final abundance of caution, Rigby re-filed the Agreement with the Commission
18 in 2009. [See Docketed Notice of Filing (5/18/2009).]

19 II. STANDARD OF REVIEW

20 Summary judgment is only appropriate if the record demonstrates that no genuine
21 issue of material fact exists and that the moving party is entitled to judgment on the merits
22 as a matter of law. See Ariz. R. Civ. P. 56(c)(1); Orme Sch. v. Reeves, 166 Ariz. 301, 305,
23 802 P.2d 1000, 1004 (1990); Nicoletti v. Westor, Inc., 131 Ariz. 140, 142, 639 P.2d 330, 32
24 (1982). Here, Mr. Dains has presented no admissible evidence entitling him to judgment
25 and his requested relief, based entirely upon his own misconduct, is precluded as a matter of
26 law.
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28

1 **III. ARGUMENT**

2 Mr. Dains' claim to entitlement to summary judgment pursuant to Commission Rule
3 R14-2-406(M) is fundamentally flawed because Mr. Dains has not presented any admissible
4 evidence that the Agreement was not filed with the Commission, the record indicates that
5 the Commission has repeatedly reviewed the Agreement, and Mr. Dains' arguments entirely
6 ignore his own misconduct in this matter.

7 **A. The Commission Should Deny Mr. Dains' Motion For Summary**
8 **Judgment As Rigby Is In Compliance With Commission Rules.**

9 As an initial matter, Mr. Dains has not demonstrated through admissible evidence
10 that the Agreement was not filed with the Commission at the time of execution. Rigby has
11 no records showing whether or not the Agreement was filed at the time of execution.
12 Mr. Dains has presented no admissible evidence demonstrating that the Agreement was not
13 filed. Accordingly, summary judgment is inappropriate on this record.

14 In addition, Rigby notes that the record demonstrates that the Agreement has now
15 been filed multiple times by not only Rigby but also by Mr. Dains. [SOF, ¶¶ 10-12.] Under
16 Commission rules, those filings also preclude summary judgment. Commission Rule R 14-
17 2-406(M) actually provides:

18 All agreements under this rule shall be filed with and approved
19 by the Utilities Division of the Commission. No agreement shall
20 be approved unless accompanied by a Certificate of Approval to
21 Construct as issued by the Arizona Department of Health
22 Services. Where agreements for main extensions are not filed
23 and approved by the Utilities Division, the refundable advance
24 shall be immediately due and payable to the person making the
25 advance.

26 The rule does not set a time limit for the filing and approval of a mainline extension
27 agreement by the Commission. Nor could it, as various circumstances might affect that
28 timing. Here, as detailed below, Mr. Dains' own actions have prevented the Commission's
review and approval of the Agreement. Accordingly, the documented 2006 and 2009 filings

1 of the Agreement with Commission Staff satisfy Rigby's obligations under Commission
2 rules and preclude summary judgment.

3 **B. The Commission Should Deny Mr. Dains' Motion For Summary**
4 **Judgment Because Mr. Dains' Own Actions Caused Any Delay In The**
5 **Filing Of The Agreement.**

6 As noted above, Commission Rule R14-2-406(M) requires that the water utility file
7 not only a copy of the executed mainline extension agreement but also "a Certificate of
8 Approval to Construct issued by the Arizona Department of Health" before the Commission
9 will review and approve the agreement. Here, pursuant to the Agreement and in accordance
10 with Mr. Dains' construction of the Terra Ranchettes system, Mr. Dains was required to
11 provide that ATC. This was consistent with the fact that Mr. Dains, and not Rigby, had
12 constructed the system several years prior to the execution of the Agreement. After the
13 Agreement was executed in March 1999, Rigby made several requests to Mr. Dains for the
14 ATC in an effort to have the Agreement approved. [See SOF, ¶ 7.] Mr. Dains, however,
15 never provided the required ATC. In fact, to date, Rigby has not received the ATC from
16 Mr. Dains. [Id., ¶ 8.]

17 Mr. Dains's present Motion simply ignores the fact that any purported, technical
18 violation of Commission Rule 14-2-406(M) rests upon Mr. Dains, not Rigby. Under well-
19 established Arizona law, however, Mr. Dains is not entitled to use his affirmative failure to
20 provide the required documentation to claim that Rigby has not met its obligations under
21 Commission rules. See Williams v. Nall, 4 Ariz. App. 416, 420, 420 P.2d 988, 992 (1966)
22 (stating that "one who prevents performance of a contract may not complain of such
23 nonperformance"); Holmes v. Graves, 83 Ariz. 174, 177-178, 318 P.2d 354, 356-57(1957)
24 (rejecting defendant's reliance on procedural rule not complied with at defendant's
25 acquiescence and holding that "provisions enacted for the benefit of individuals may be so
26 far waived by those for whose benefit they were enacted that they are estopped to insist
27 upon their protection"); Rossi v. Hammons, 34 Ariz. 95, 101, 208 P. 181, 183 (1928) ("one
28 who invites error is thereafter estopped from complaining of it"). Such a result would be

1 both inequitable and unjust.¹

2 Mr. Dains, not Rigby, must provide the ATC necessary for approval of the
3 Agreement. Formal review and approval cannot be had until Mr. Dains provides the
4 required (and repeatedly requested) ATC. The undisputed facts show that any purported
5 noncompliance with Commission rules lies entirely with Mr. Dains. As no genuine issue as
6 to material fact exists that would support a ruling in Mr. Dains' favor, the Commission
7 should deny his Motion for Summary Judgment as a matter of law.

8 **III. CONCLUSION**

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10 The Agreement has been filed with the Commission on several occasions. Further,
11 Rigby has made numerous attempts to obtain the ATC from Mr. Dains in an effort to have
12 the Agreement approved by the Commission. Mr. Dains, however, has ignored such
13 requests and has unilaterally prevented Rigby from obtaining Commission approval of the
14 Agreement. Therefore, Rigby asks that the Commission deny Mr. Dains' Motion for
15 Summary Judgment.

16 RESPECTFULLY SUBMITTED this 7th day of June, 2009.

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1 Just as importantly, and as discussed in Rigby's pending Motion to dismiss, Mr. Dains did not seek to enforce his purported rights for over seven years, despite having full knowledge of his potential cause of action. Even then, Mr. Dains' informal complaint was closed by the Commission without action. Now, after nearly an additional three years, Mr. Dains is seeking another bite of the apple, apparently in an attempt to profit from the City of Avondale's proposed acquisition of Rigby. Mr. Dains' latest attempt should be rebuffed as was his earlier attempt.

1 **ORIGINAL** and 13 copies of the foregoing
2 filed this 9 day of June, 2009 with:

3
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9 COPY of the foregoing mailed
10 this 9 day of June, 2009, to:

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